No. 90-95



# In The

# Supreme Court of the United States

OCTOBER TERM, 1989

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THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

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On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Sixth Circuit

## PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Ohio, *et al.***

## QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in concluding that a provision of the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 434, may be construed as the express intention of Congress to preempt Ohio statutes and administrative regulations that are expressly preserved by the federal Hazardous Materials Transportation Act (HMTA), 49 U.S.C. App. § 1811(a).

## LIST OF PARTIES

**The Public Utilities Commission of Ohio**, and,
**Jolynn Barry Butler**, Chair
**J. Michael Biddison**, Commissioner
**Ashley C. Brown**, Commissioner
**Richard M. Fanelly**, Commissioner
**Lenworth Smith**, Commissioner,
in their respective capacities as Chair and Commissioners of the Public Utilities Commission of Ohio

**CSX Transportation, Inc.**
**Consolidated Rail Corporation**
**Norfolk and Western Railway Company**
**Grand Trunk Western Railroad Company**

## AMICUS CURIAE
## SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

The State of Washington
The State of Arizona
The State of California
The State of Louisiana
The State of Missouri
The State of Montana
The State of Nevada
The State of Texas
The National Association of Regulatory Utility Commissioners
The Railway Labor Executives' Association

## AMICUS CURIAE
## URGING DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

The United States of America, represented by the Solicitor General

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## INTRODUCTION

On December 31, 1990, the Solicitor General filed an amicus curiae brief (hereinafter cited as S.G. Brief) in response to the court's order requesting the views of the United States. Petitioner, the Public Utilities Commission of Ohio, respectfully submits this supplemental brief in response.

## DISCUSSION

The Solicitor General's brief misconstrues the law and attempts to trivialize the important state interest presented in this case. The premise of the Solicitor General's legal analysis is that an intention to preempt state law may be attributed to Congress despite the fact that Congress has enacted a statutory scheme preserving state law. However, the consistent decisions of this Court require an assumption that preemption of the states' police power is not to be presumed unless that was the clear and manifest purpose of Congress. In this case, preemption has been presumed over the manifest intent of Congress. The Solicitor General's brief proceeds along five erroneous assumptions.

1. First, the Solicitor General postulates that the 1970 inclusion of the Explosives and Other Dangerous Articles Act, 18 U.S.C. 831-835 (repealed 1979), in the appendix of a committee report listing laws supplementing the FRSA, indicates that Congress intended the FRSA to preempt state hazardous materials laws relating to rail. From this premise, the Solicitor General concludes that the FRSA still preempts state intermodal hazardous materials laws because the preemption provision of the FRSA has not been changed since 1970. S.G. Brief at 8-9.

This legal analysis simply denies the enactment of the HMTA in 1974. With the enactment of the HMTA, Congress specifically removed the Explosives Act from the list of laws supplementing the authority of the Secretary of Transportation under the FRSA:

> The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary *pertaining to railroad safety* as set forth in the statutes transferred to the Secretary by subsection (e) of this section (*other than [the Explosives and Other Dangerous Articles Act]*).

49 U.S.C. § 1655(f)(3)(A) (1974) (repealed 1983) (emphasis added). The Secretary has no authority under the FRSA beyond that delegated to the Federal Railroad Administration. 49 U.S.C. § 103(c) (1982 & Supp. V 1987).

By removing the Explosives Act from the scope of "railroad safety laws" under the FRSA, Congress manifested its intention that the modal safety statutes would no longer reach the intermodal transportation of hazardous materials. Under the HMTA, federal regulation of the transportation of hazardous materials was limited to the HMTA, and was required to be intermodal in nature. 49 U.S.C. App. § 1802(6).

The logical conclusion of the Solicitor General's argument is that the Secretary may preempt state hazardous materials laws pursuant to a statute, the FRSA, under which Congress denied the Secretary the *authority to regulate* the transportation of hazardous materials. This result creates a conflict between the FRSA and the HMTA, and renders the actions of Congress absurd.

2. In his next point, the Solicitor General recognizes that his argument has created a statutory conflict. That conflict is furthered by denying the express language of the HMTA. S.G. Brief at 13-14. Specifically, the Solicitor General concludes that the HMTA did not expressly preserve consistent state laws, but "simply left such consistent state requirements not preempted *by HMTA*." *Id.* at 13.

The HMTA expressly requires intermodal regulation (49 U.S.C. App. §§ 1801, 1802(2), 1802(6)), preempts inconsistent state laws (49 U.S.C. App. § 1811(a)), and establishes an administrative procedure to resolve federal and state jurisdictional disputes (49 U.S.C. App. § 1811(b)). This Court has specifically held that in creating such a dual system of federal and state regulation, an "affirmative grant of power to the states" is not necessary to avoid preemption. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 210 (1983). Rather, as the Court noted, by permitting state regulation Congress underscored the distinction between the spheres of activity left respectively to the federal government and the states. *Id.*

3. Having created a statutory conflict by concluding that Congress intended to apply inconsistent preemption provisions to the same state laws, the Solicitor General resolves that conflict by recommending that the HMTA be ignored. In this regard,

according to the Solicitor General, the preemption provisions of the FRSA and HMTA can be "reconciled" by creating an exception to the HMTA for railroads. S.G. Brief at 14. Thus, under the HMTA, consistent state intermodal hazardous materials requirements would apply to all modes of transportation other than by rail; under the FRSA, any state intermodal hazardous materials regulation affecting railroads would be preempted. *Id.*

The State of Ohio respectfully submits that such a construction can hardly be termed a "reconciliation" of the statutes. *See Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). Contrary to the Solicitor General's claim, his construction serves to "completely oust" the express requirements of the HMTA that all federal regulation be intermodal (49 U.S.C. App. § 1802(6)), and that consistent state laws be preserved (49 U.S.C. App. § 1811).

The only possible "reconciliation" of the statutes is to recognize that Congress avoided such a conflict by removing the regulation of the intermodal transportation of hazardous materials from the scope of the modal safety statutes, including the FRSA. *See* 49 U.S.C. § 1655(f)(3)(A) (1974) (repealed 1983). In enacting the HMTA, Congress removed any authority to regulate the transportation of hazardous materials from each of the modal safety statutes, including the FRSA, and required intermodal regulation exclusively under the HMTA. There simply is no conflict if the actions of Congress are recognized, and the law as written is followed.

Further, even if the FRSA and the HMTA were considered to be in conflict, as the Solicitor General suggests, the most basic tenets of statutory interpretation would still require that the HMTA prevail. First, the Solicitor General has ignored the fundamental rule that "where provisions in . . . two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982) (citations omitted). Secondly, the Solicitor General has disregarded the rule that "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic v. United States*, 446 U.S. 398, 406 (1980).

The HMTA, enacted in 1974, is unquestionably the later enacted statute, and is clearly more specific than the FRSA, enacted in 1970. The HMTA addresses, and is limited to, the specific area of

intermodal hazardous materials transportation. In contrast, the FRSA governs the entire spectrum of rail safety issues. Thus, even accepting the Solicitor General's conclusion that the statutes conflict, the manifest intent of Congress to preserve state laws under the HMTA must take precedence.

4. The Solicitor General concludes his legal analysis by asserting that this Court's previous preemption cases have no application to this case. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983).

With respect to *Louisiana*, the Solicitor General correctly notes that "the Court stressed the fact that the FCC's enabling statute contained a jurisdictional limitation intended to 'fence[ ] off' the FCC from regulating intrastate service, thereby preserving a state role." S.G. Brief at 15, *citing Louisiana*, 476 U.S. at 369-70. Applying *Louisiana* to the case at bar, the Solicitor General concludes that "[n]o comparable jurisdictional boundary, purporting to constrain federal authority, exists with respect to rail safety regulation; rather, once the Secretary has acted, his regulations preempt the field." S.G. Brief at 15.

In reaching this conclusion, the Solicitor General has once again ignored the enactment of the HMTA. Congress expressly "constrained federal authority" to regulate the transportation of hazardous materials by removing such authority from the scope of the Secretary's railroad safety powers under the FRSA. 49 U.S.C. § 1655(f)(3)(a) (1974) (repealed 1983). A "jurisdictional boundary" was created by the HMTA, under which regulation was required to be intermodal, and consistent state laws were preserved. 49 U.S.C. App. §§ 1802(6), 1811(a).

Similarly, the Solicitor General applies this Court's holding in *Pacific Gas* as if the HMTA did not exist:

> Significantly, no provision at issue in *Pacific Gas & Elec.* specifically ousted the States from playing their traditional regulatory role. In FRSA, however, Congress carefully addressed the role of the States with respect to rail safety, and determined that the need for a nationally uniform regulatory and enforcement system was paramount.

S.G. Brief at 15-16.

If the HMTA is considered, it is clear that Congress intended to preserve state authority to regulate the transportation of hazardous materials, so long as such regulation was consistent with the HMTA and federal regulations. 49 U.S.C. App. § 1811. In *Pacific Gas*, this Court found that "the Federal Government has occupied the entire field of nuclear safety concerns, *except* the limited powers expressly ceded to the States." *Pacific Gas*, 461 U.S. at 212. In the case at bar, the federal government has occupied the field of railroad safety, but Congress has, under the HMTA, specifically ceded limited power to the states to consistently regulate the intermodal transportation of hazardous materials. The Solicitor General's selective legal analysis cannot change that fact.

5. Finally, the Solicitor General has incorrectly suggested that the "practical significance" of this case has been "diminished" by recent amendments to the HMTA and FRSA. S.G. Brief at 16-18. The "recent amendments," enacted on November 16, 1990, allow the states to investigate and report violations of federal hazardous materials rules to federal authorities. Thus, Congress provided for limited state enforcement of hazardous materials rules in the same manner that federal rules promulgated under the FRSA have been enforced since 1970. *See* 45 U.S.C. § 435(a). In the opinion of the Solicitor General, this amendment "addresses in significant respects the concerns that prompted Ohio's action." S.G. Brief at 18.

The State of Ohio must respectfully disagree, and point out that the Solicitor General is not in a position to determine what will satisfy Ohio's concerns for the health and safety of its citizens. The State of Ohio certainly does not view the recent amendments as diminishing the practical significance of this case. To the contrary, reporting violations to the federal authorities, who have shown no inclination to even assess fines for reported violations, does not satisfy the states' concerns[1]. Ohio has a federal statutory right to consistently enforce the HMTA in its own program, utilizing its own funds, for the benefit of its own citizens. No lesser remedy will suffice.

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1 If "practical considerations" are to be addressed, the Solicitor General has neglected to mention the abysmal record of the federal government in enforcing hazardous materials regulations pertaining to railroads. See GAO Report to the Chairman, Committee on Energy and Commerce, House of Representatives, Railroad Safety: DOT Should Better Manage its Hazardous Materials Inspection Program, GAO/RCED-90-43 (November, 1989).

In enacting the recent amendments, Congress did not redefine the intermodal transportation of hazardous materials as an "area of railroad safety" under the FRSA, as the Solicitor General implies (S.G. Brief at 17). Rather, Congress expressly noted that:

> Finally, while the bill does not authorize the States to enforce their own regulations, the bill does make it clear that *such legislation is not intended to affect the pending litigation on the question of whether a State has enforcement authority against the railroads for hazardous materials violations*. Thus, a reviewing court may conclude that the State is authorized to enforce State hazardous materials regulations against the railroads.

136 Cong. Rec. S17, 276 (daily ed. Oct. 26, 1990) (statement of Sen. Breaux) (emphasis added).

Thus, the clear intent of the 1990 amendments was to permit those states that have not enacted state hazardous materials laws to participate in limited enforcement of the federal regulations. Congress expressly avoided any impact on states, such as Ohio, where laws providing for consistent state enforcement programs were already in place. With respect to the alleged preemption of state hazardous materials laws enacted under the authority of the HMTA, Congress preserved the status quo, leaving it to this Court to uphold the manifest purpose of the HMTA.

In enacting the HMTA in 1974, the intent of Congress to bolster federal enforcement by preserving consistent state hazardous materials laws was clear. Congress was appalled at the lack of enforcement at the federal level:

> The Committee found that after three and one half years, the FRA inspection of rail equipment and plant seems to be a stepchild of the Department's low key safety approach. By April 1974, the FRA had only 12 track inspectors for over 300,000 miles of rail track, 16 signal and train control inspectors, and only 50 inspectors for more than 1.7 million freight cars and 25,000 locomotives. *There were only 8 inspectors for hazardous materials.*

H.R. Rep. No. 1083, 93d Cong., 2d Sess. 6-7 (1974) (emphasis added).

Congress recognized the urgent safety concern requiring the additional enforcement capability of the states:

> Since January 1, 1973, there have been 124 rail accidents in which hazardous materials carried aboard the train were involved. Casualties included 7 persons killed and 159 injured. In 30 of the accidents, evacuation was necessary for employees in terminal or plant areas, or for persons in communities adjacent to the accident site. In 29 of the accidents, contamination by potentially lethal chemicals occurred. Fires occurred in 34 accidents, and in 92 of the accidents, the hazardous materials were spilled out of their containers.

*Id.* at 15. Thus, the intent of Congress to not only preserve, but to encourage consistent state enforcement, was first expressed in 1974.

In 1980, Congress made it crystal clear that the HMTA was not to be considered a rail safety statute supplementing the FRSA. In describing the authority of both the Secretary and the states under the FRSA, the HMTA was expressly excluded as one of the railroad safety laws supplementing the FRSA. Specifically, Congress noted that "[s]ince the Hazardous Materials Transportation Act is not directed specifically and solely at railroad safety, that Act is not within the scope of the amendment." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 13 (1980).

Finally, in 1990, Congress again reviewed the federal enforcement program and found a distinct lack of progress. *See* GAO Report to the Chairman, Committee on Energy and Commerce, House of Representatives, *Railroad Safety: DOT Should Better Manage its Hazardous Materials Inspection Program*, GAO/RCED-90-43 (November, 1989). In order to further federal enforcement, Congress permitted and encouraged the states to participate in the federal program, primarily to conduct inspections. Congress left untouched those states, such as Ohio, where state legislatures had already made a commitment to consistently enforce the HMTA on the state level.

Thus, in 1974, 1980, and 1990, Congress has manifested a clear intention to preserve state intermodal hazardous materials laws. In the most recent amendments, Congress reviewed the case at bar, and placed its confidence in this Court to uphold the HMTA as it was enacted in 1974. The failure of the Court to accept this case will redefine the jurisprudence of preemption in the lower federal

courts, will effectively overturn the *Louisiana* and *Pacific Gas* decisions, and will deprive the citizens of Ohio of the protection of their health and safety that Congress has granted.

## CONCLUSION

The brief of the Solicitor General has reaffirmed the proposition of law stemming from the case below: whenever an ambiguous legislative history permits preemption to be asserted, the states will shoulder the burden of proving that Congress *did not intend to preempt*. The decisions of this Court are to the contrary: courts must start with the assumption that the police power of the states is not to be superseded by federal enactments *unless that was the clear and manifest purpose of Congress*. The manifest purpose of Congress in the case at bar was to require intermodal regulation of the transportation of hazardous materials, including transportation by rail, and preserve consistent state laws. The challenged laws of the State of Ohio comport with that purpose, and should be upheld.

For the foregoing reasons, Petitioners respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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